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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006	)))))	Rulemaking 06-10-005 (Filed October 5, 2006)

JOINT REPLY COMMENTS OF THE LEAGUE OF CALIFORNIA CITIES AND THE STATES OF CALIFORNIA AND NEVADA CHAPTER OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

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November 1, 2006

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I. Introduction and Scope of Reply Comments

Pursuant to the Rules of Practice and Procedure of the Public Utilities Commission of the State of California ("Commission") and Ordering Paragraph 6 of R.06-10-005, Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006, filed on October 5, 2006 ("OIR"), the League of California Cities and the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (the "League/SCAN NATOA") hereby submit the following joint reply comments to the opening comments of the many respondents and interested parties with respect to the Proposed General Order ("Proposed G.O.").

II. Discussion

A. Fees

First, the League/SCAN NATOA join with other parties[1] to urge the Commission to clarify in the Proposed G.O. that any user fee constitutes a "fee of general applicability" and, therefore, the user fee should be excluded from the definition of "franchise fees" under federal law.[2] The Commission should also include a statement in the application form, Appendix A to the Proposed G.O. [3], requiring an applicant for a state video franchise to certify as part of the Affidavit that the applicant agrees that the Commission's application and annual assessments fees are not, and are not intended to be deemed, franchise fees.

Second, parties filing opening comments generally support the Commission's proposal to recover the costs of administering state-issued video franchises is though a combination of application-specific fees and a subscriber-based user fee.[4] However, these parties also pose a wide variety of questions and concerns regarding the amount and methodology for calculating these fees.

The League/SCAN NATOA agree with AT&T that the year-one estimate of the user fees should reflect the apparent ministerial role and limited duties the Legislature has delegated to the Commission by AB 2987. We therefore support AT&T's proposal that

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[1] *See* County of Los Angeles (Los Angeles") Opening Comments, pp. 4-5; City of Oakland ("Oakland") Opening Comments, pp. 5-6; the Cities of Arcadia, Berkeley, Long Beach, Redondo Beach and Walnut and Pasadena (hereinafter jointly referred to as "the Cities") Opening Comments, pp. 4-5; see also Opening Comments of the Division of Ratepayer Advocates ("DRA"), p.5.

[2] 47 U.S.C. § 542(g).

[3] Application for a New or Amended California State Video Franchise California Public Utilities Commission, Appendix A, General Order XXX Implementing the Digital Infrastructure and Video Competition Act of 2006 (AB 2987).

[4] *See, e.g.,* SureWest TeleVideo ("SureWest") Opening Comments, pp.13-14, Exhibit A, pp. 10-11; AT&T California ("AT&T") Opening Comments, pp. 11-12, Attachment A, p. 11; Verizon California ("Verizon") Opening Comments, pp. 23-24, Attachment, p. 1.

the Commission should establish specific criteria that the Commission will use to determine the annual user fee.[5]

For similar reasons the League/SCAN NATOA disagree with comments of those parties that would inflate the Commission's year-one estimate by a factor of two or three.[6] Those parties seek to justify this increase as necessary to support their additional proposals to expand the Commission's regulatory role beyond the clear boundaries of AB 2987.[7] The Commission should reject these proposals.

Third, the League/SCAN NATOA support the proposal of SureWest urging the Commission to amortize its anticipated year-one start-up costs over subsequent years. Rather than paying those costs now when state franchise holders are likely to have fewer subscribers, this would allow those costs to be spread among more subscribers as state franchise holders grow their customer bases.[8]

The League/SCAN NATOA also support SureWest's suggestion that the Commission charge an application fee for any application, whether it is an initial application, renewal or amendment.[9] This would allow the Commission to recover more of its costs on a cost-for-service basis.

B. Protests of applications and other Commission actions

Many parties advocate for the necessity of a protest procedure for applications, amendments, renewals, transfers and other actions coming before the Commission.[10]

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[5] AT&T Opening Comments, p. 12.
[6] *See, e.g.*, the Greenlining Institute Opening Comments, pp. 7-8.
[7] *Id.*
[8] SureWest Opening Comments, p. 14-15.
[9] *Id.*, p. 14.
[10] *See, e.g.*, Opening Comments of the following parties: Division of Ratepayer Advocates ("DRA"), pp. 3-4; The Utility Reform Network ("TURN"). pp. 3-6; the County of Los Angeles, pp. 9; Cities, p. 2;

Only the Small Local Exchange Carriers ("Small LECs") and Verizon California ("Verizon") voice support for the Commission's tentative conclusion that protests should not be allowed.[11] The League/SCAN NATOA disagree with the Small LECs and Verizon, and generally agree with the several parties that urge the Commission to establish a protest procedure.

Those parties offer many compelling arguments in favor of instituting a protest procedure. For example, TURN observes that numerous sections of AB 2987 seek to protect consumer interests and anticipate the need for consumer advocacy, so it would be a "fundamental misinterpretation to read AB 2987 as prohibiting protests when that very legislation simultaneously seeks to protect consumers on a number of levels."[12] With respect to renewal applications, the County of Los Angeles notes that, "[a]ny state franchise renewal process which does not, at minimum, afford the public with adequate opportunity for participation and comment, will not be "consistent with federal law and regulation" and therefore, will not be consistent with the language or intent of AB 2987."[13]

The Division of Ratepayer Advocates ("DRA") points out that "the requirement that an applicant for a state video franchise deliver a copy of the application 'to any local entity where the applicant will provide service' is an acknowledgement that local entities should be afforded an opportunity to bring any concerns they might have to the

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Consumer Federation of California ("CFC"), pp.4-5; California Community Technology Policy Group and Latino Issues Forum ("CCTPG/LIF"), pp. 4-5.

[11] The Small LECs support this position by stating that since "AB 2987 does not provide for a protest mechanism, so the Commission should not modify the legislation by enacting one." Small LECs Opening Comments, p. 7. See Verizon Opening Comments, pp. 6-7. However, the League/SCAN NATOA and other commenting parties have cited to several provisions of the statute that provide support that a protest procedure is not only allowed but contemplated by the statute's language.

[12] TURN Opening Comments, pp. 4-5.

[13] County of Los Angeles Opening Comments, p. 9.

Commission."[14] In addition, The League/SCAN NATOA support DRA's perspective that the Commission's failure to permit protests would constitute a denial of due process.[15]

The real problem with any protest procedure under AB 2987 appears to be that the statute's time limits for the Commission's review of applications are extremely short, allowing very little time to adequately register and consider a protest. However, this is not a valid regulatory policy reason for the Commission to prohibit interested parties from filing protests where the statute does not expressly prohibit protests. In order to reconcile these seemingly conflicting concerns, DRA, TURN and the League/SCAN NATOA have each proposed expedited protest procedures that would fairly accommodate the statute's narrow time limits, while providing an opportunity for local government and other interested parties to comment on applications for state franchises.[16]

The Commission's omission to institute a protest rule and procedure would simply carry any perceived "ministerial" role of the Commission to an extreme not reasonably contemplated by the Legislature. The Commission should consider the compelling arguments supporting the right to file protest and revise the Proposed G.O. to include a provision that will sufficiently address the need for an expedited protest procedure.

C. Single franchise for all affiliates under one parent

The telephone and cable provider parties assert disparate positions about the Commission's tentative conclusion that any company with subsidiaries or affiliates may

[14] DRA Opening Comments, pp. 3-4, (citations omitted).
[15] *Id*.
[16] See the League/SCAN NATOA Opening Comments, p. 11; DRA Opening Comments, p. 4; TURN Opening Comments, p. 5.

receive only a single state franchise, issued to the parent of the subsidiaries or affiliates. (Proposed G.O. at §V.A) AT&T states that it supports the Commission's proposed limitation of one franchise per company, but it does not support the requirement that the franchise must be held by the parent entity.[17] AT&T states that this requirement may lead to "unintended consequences," such as the award of a franchise to a parent that is not the entity actually providing the service and operating the network, contrary to the statute.[18] In its comments, Verizon appears to assert a similar position.[19]

While SureWest's comments raise similar concerns, SureWest suggests that the Commission could resolve those concerns by issuing the state-issued franchise to only one company within a family of companies (not necessarily the parent) and prohibiting other subsidiaries or affiliates of the same company from holding multiple state-issued franchises.[20] The League/SCAN NATOA agree that the parent entity, if it is only a holding company, may not always be the appropriate holder of a state video franchise within a group of subsidiaries or affiliates. The League/SCAN NATOA would support SureWest's proposal, so long as it is consistent with the requirement that the Commission will issue only one franchise per a single company.[21]

Conversely, the League/SCAN NATOA cannot agree with the comments of the California Cable and Telecommunications Association ("CCTA") in which CCTA "strongly oppose(s) any requirement that restricts entities which currently hold local

[17] AT&T Opening Comments, p. 5.
[18] *Id.*, p. 6.
[19] Verizon states, "Requiring a corporate parent to hold a franchise is very different from prohibiting multiple franchises, and the OIR's effort to [limit the franchise to the parent] finds no support in the Act or in Commission practice." Verizon Opening Comments, p. 16.
[20] SureWest Opening Comments, p. 5.
[21] The League and SCAN NATOA also suggest that the Commission modify its rule to prohibit the issuance of state franchises to holders that are not California companies. Such a rule would prevent routine removal by state franchise holders of disputes to federal court, even though the dispute may be very small and entirely local in nature.

franchises, or any other affiliate of their parent corporation, from obtaining state issued franchises."[22] CCTA asserts that a rule prohibiting multiple franchises for a single operator would lead to negative tax consequences, or a forced reorganization or termination of a subsidiary or affiliate.[23]

However, CCTA appears to base these concerns on a misunderstanding of the Commission's proposed rule. The rule does not require any type of "roll-up" or reorganization of corporate entities, nor does it require the "combining [of affiliates] operations into one entity."[24] It merely grants authority to multiple subsidiaries or affiliates to provide video services under one franchise.[25]

Therefore, the Commission should reject CCTA's position, or at minimum, require an applicant to provide substantial evidence of such harm before issuing multiple franchises to one entity. Granting multiple franchises to one corporate entity should be the exception rather than the rule.

D. Requirement that expired franchises be extended until January 2, 2008

CCTA argues that the Commission should adopt a timetable to ensure that incumbent cable operators with expired franchises do not encounter a gap in their authority to provide services between January 2, 2008 (the earliest date an incumbent could effectively receive a state franchise) and the effective date of the incumbent's state-

[22] CCTA Opening Comments, p. 6.
[23] *Id.*, p. 7.
[24] *Id.*, p. 8.
[25] CCTA also identifies concerns for systems with minority ownership interests operating under a franchise not held by the minority owner. CCTA Opening Comments, p 7. While such concerns are not entirely misplaced, the Commission could, under its proposed rule, exercise discretion to treat such minority-owned systems as a separate entity and issue an additional franchise if necessary to protect the minority owner's interests.

issued franchise.[26] While the League/SCAN NATOA do not necessarily oppose CCTA's request that incumbent cable operators should be allowed to apply for a state-issued franchise early enough to avoid gaps in franchising authority,[27] we note that CCTA has repeatedly misstated the scope and purpose of the relevant section of AB 2987. CCTA implies that Cal. Pub. Util. Code § 5930(b) provides that the local franchising authority "shall extend" the local franchise through January 2, 2008. However, as several parties point out, § 5930(b) expressly provides that the local franchise authority "*may* extend" (emphasis added) the local franchise through January 2, 2008.[28]

Under the plain meaning of the section, the extension of a local franchise (effectively an arms-length contract negotiated between a cable operator and a local franchising authority) should properly remain the decision of the two parties who negotiated that franchise. Any Commission intervention is contrary to AB 2987, and those who request otherwise should be denied.[29]

E. CCTA's argument that the Commission is seeking to unlawfully extend its authority over renewal, suspension or revocation of state-issued franchises is without merit

The League/SCAN NATOA strongly disagree with CCTA's assertion that the Commission seeks to extend its authority to review a renewal request, or to suspend or

[26] *See,* CCTA Opening Comments, pp. 3-5.
[27] The League/SCAN NATOA note that rarely, if ever, has a cable operator incurred penalties or harm of the sort envisioned by CCTA when a franchise that has not been renewed expires. Generally, both operator and local government simply continue business as usual until the franchise is renewed.
[28] See County of Los Angeles Opening Comments, pp. 3-4; League/SCAN NATOA Opening Comments, pp. 12-14; and City of Oakland Opening Comments, pp.4-5.
[29] The League/SCAN NATOA also agree with the City of San Jose that the Proposed G.O. should clearly provide that an incumbent cable operator may not continue to operate under an expired franchise after January 2, 2008, and must either negotiate a renewal or extension with the local franchise authority or obtain a state franchise on that date. City of San Jose ("San Jose") Opening Comments, pp. 1-2.

revoke a state-issued franchise.[30] With respect to a renewal, CCTA objects to a provision of the Proposed G.O. that a State Video Franchise Holder must be *in good standing* in order to file a renewal application, on the grounds that there is no specific language in AB 2987 requiring "good standing" as a condition of a renewal.[31] However, the Commission is expressly authorized to obtain "adequate assurances" that the applicant has the financial, legal and technical qualifications to provide video services.[32] Whether a state franchise holder is in compliance with the terms and conditions of the state franchise (*i.e., in good standing*), is relevant to determining if "adequate assurances" are present.

CCTA also argues that the Commission lacks authority to suspend or revoke a franchise if a video service provider fails to comply with the applicable requirements of the Division 2.5 of the Cal. Pub. Util. Code.[33] CCTA supports this position, in part, by pointing out that the remedy for many types of disputes under AB 2987 lies before the courts, not the Commission.[34] However, the fact that certain disputes under the statute must be resolved in court does not bar (and from a public regulatory policy perspective should not bar) the Commission from initiating a review of those disputes whenever they are relevant to the question of whether the renewal application contains adequate assurances of financial, legal and technical qualifications to operate the system.

Likewise, the authority to determine whether such adequate assurances are present in an initial or renewal application implies the concurrent authority to suspend or

[30] CCTA Opening Comments, pp. 8-10.
[31] *Id.*, p.9 (emphasis in original).
[32] Cal. Pub. Util. Code § 5840(e)(9). This provision applies both to initial applications and renewals. Cal. Pub. Util. Code § 5850(b).
[33] CCTA Opening Comments, p. 9-10. CCTA argues that § 5890(g), which grants the Commission authority to "suspend or revoke the franchise if the holder fails to comply with the provisions of this division," does not "accurately reflect the intent of the legislature." *Id.*, p. 9 footnote. 5.
[34] *Id.*, p. 10.

revoke a state-issued franchise under Cal. Pub. Util. Code § 5890(g), when those qualifications are shown to be seriously lacking. Thus, CCTA's assertion that the Commission will unlawfully extend its authority over renewals, suspensions or revocations if the Proposed G.O. is adopted lacks merit, and should be rejected by the Commission.

F. AT&T's argument that AB 2987 requires only notice to the Commission of a service area change is flawed

The League/SCAN NATOA strongly disagree with AT&T's proposed limitation of the Commission's authority to establish procedures for changes in service areas under AB 2987.[35] According to AT&T, AB 2987 would allow the Commission to establish procedures for changes in a holder's service area, but these procedures must be limited to a requirement that the holder provide adequate notice.[36] In essence, AT&T argues that the Commission's express authority to establish procedures to amend a state-issued franchise to reflect changes in service areas (granted in Cal. Pub. Util. Code § 5840(f)) is somehow limited by Cal. Pub. Util. Code § 5840(m)(6) (a section that requires notice to the Commission for a variety of changes to information in the initial application).

However, nothing in the notice requirement contained in § 5840(m)(6) limits the Commission's authority under § 5840(f) to adopt procedures for service area amendments to an initial application. In other words, while AT&T asserts that § 5840(m)(6) is an absolute limit on the Commission's authority with respect to service area changes, that section is instead a minimum requirement for the Commission's

[35] AT&T Opening Comments, pp. 2-3.
[36] *Id.*, p. 3.

exercise of such authority. Any other interpretation would rob that portion of § 5840(f) of any meaning whatsoever. The Commission should reject AT&T's arguments.

G. Telephone and cable operator concerns about reporting requirements are overstated

Several parties express concerns that state franchise holders could be required to submit reports and information to the Commission that are overbroad, unnecessary or that require the provider to disclose confidential or proprietary information.[37] The Commission should not be swayed by such arguments. Local governments regularly receive similar objections by incumbent cable operators in response to various requests for information that is required under local franchises. In most cases, those objections are without merit.

Most importantly, the Commission should not determine in this proceeding whether information from state franchise holders should receive confidential treatment. Instead, the Commission should consider the merits of confidentiality claims on an individual basis when state franchise holders file their reports.[38] In particular, for information required to be collected and disclosed pursuant to Cal. Pub. Util. Code §

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[37] *See,* AT&T Opening Comments, pp. 8-9; CCTA Opening Comments, pp. 13-14; Verizon Opening Comments, pp. 18-22; SureWest Opening Comments, pp. 15-16.

[38] The Federal Communications Commission has followed a case-by-case approach in deciding whether cable operator reporting data should be treated as confidential. *See, e.g.*, *In the Matter of Request for Confidentiality for Information Submitted on Forms 325 for the Year 2004*, DA 06-547 (March 7, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-547A1.doc; *In the matter of Cox Communications, Inc. Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, DA-06-546, *at* ¶ 7) (March 7, 2006) (internal quotation marks and footnote omitted), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-546A1.doc ("To determine commercial information should be kept confidential, we must determine whether there is evidence that shows that disclosure of the information will cause Cox substantial harm. Where competitive harm is the issue, resolution of the matter in favor of non-disclosure requires a showing that "(1) they actually face competition, and (2) substantial competitive injury would likely result from disclosure. If a party meets this test, then we can find that the threats to competition from disclosure outweigh the public benefit of disclosure.").

5960, a Commission finding that treats broad categories of such information as confidential could substantially impact the enforcement of anti-discrimination and build-out provisions of the statute.

The Commission should not compromise its authority to require reports necessary to effectively perform its duties, or to disclose or otherwise make available the information contained therein to local governments and other interested persons. It should deliberate on individual requests for confidentiality on a case-by-case basis.

H. Local governments have no duty to provide reports to the Commission or notice to incumbent cable operators

One party suggests that local governments should be required to submit reports to the Commission regarding video service provider performance under state-issued franchises.[39] Another party recommends that local governments should provide notice to incumbent cable operators when a new service provider intends to provide service in the jurisdiction. [40] These recommendations have no basis in state law or Commission regulatory authority, and should be summarily rejected by the Commission.

With respect to adequate notice to incumbent cable operators, the League/SCAN NATOA support the comments of DRA concerning public notice.[41] DRA proposes that the Commission should post notice of submitted franchise applications, as well as any non-proprietary portions of those applications, on the Commission's web-site within 24

[39] *See, e.g.*, CCTPG/LIF Opening Comments, pp. 8 ("As part of the Commission's procedures to provide the ultimate authority over consumer protections, the Commission should receive reports from local entities on the customer service of video franchises.").
[40] Small LECs Opening Comments, p. 6 ("Upon receiving notice from the state franchisee to offer service in a given area, the local franchising authority should notify the incumbent provider, either by posting the information on its web site, or by directly informing the incumbent."). See also CCTA Opening Comments, pp. 11-12.
[41] DRA Opening Comments, pp. 4-5.

hours of receipt. Additionally, other Commission-required notices, such as notice concerning changes in service area, should be posted on that website

III. Conclusion

The members of the League/SCAN NATOA are ready, willing and able to participate in a collaborative partnership with the Commission with respect to the Commission's faithful execution of its duties established by AB 2987.[42] The League/SCAN NATOA members possess a wealth of knowledge and experience in the franchising process and in the promulgation of applicable ordinances, rules and procedures at the local government level.

The Commission could best facilitate this partnership by adopting clear and concise rules and procedures that would permit the League/SCAN NATOA members as well as their cable and video service customers to timely and appropriately contribute in all phases of the state-issued franchise process, in furtherance of the Legislature's express intent, which are incorporated in Cal. Pub. Util. Code section 5810(a)(2). Indeed, the Legislature implicitly contemplates a cooperative effort by the CPUC and local governments during the transition period until 2008, and beyond, with respect to existing local franchises and new state franchisees. The Commission, the Division of Ratepayer Advocates, and the League/SCAN NATOA must work together to effectively achieve the regulatory perspective envisioned by the Legislature.

[42] On October 17, 2006, at the 2006 Conference of Public Utility Counsel annual meeting, held at the Resort At Squaw Creek, Olympic Valley, California Commissioner Chong spoke of her desire for the Commission to work in partnership with the League of California Cities in the implementation of the Commission's duties under AB 2987, including but not limited to the administration of customer service standards. Local governments are encouraged by the Commission's efforts to work closely with the League's members as partners in this collaborative endeavor.

In this spirit of cooperation, the League/SCAN NATOA respectfully request that the Commission consider these reply comments and adopt the League/SCAN NATOA's recommendations in its draft decision.

Dated: November 1, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties for which an electronic mail address has been provided, this day served a true copy of the original attached

JOINT OPENING COMMENTS OF THE LEAGUE OF CALIFORNIA CITIES AND THE STATES OF CALIFORNIA AND NEVADA CHAPTER OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

on all known parties of record in this proceeding or their attorneys of record.

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